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No. 84-518, No. 84-710

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,

Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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CASES CONSOLIDATED AND CERTIORARI GRANTED JANUARY 14, 1985

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RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Fourth Circuit

No. 811965

10/01/81 — CASE DOCKETED. Awaiting ROA. rjb.

9/23/82 — MOTION (I-263) of A for stay treated as a motion to hold case in abeyance pending the Supreme Court's decision in *EEOC v. Wyoming*, filed (CRL:jeh)

10/04/82 — RESPONSE/1tr. of Es to motion I-263, filed. (CRL:fls)

10/07/82 — ORDER holding case in abeyance pending decision in Supreme Court in *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), etc., filed. Copy to Brown-Hartman-Gawlik; Lisser; Bekman-Engelman-Cooperman. (1tr.)

4/25/84 — PETITION FOR REHEARING (D-112) and suggestion for rehearing en banc of Es, filed (SAW;jm) Transmitted to HLW, FDM, JDB on 4/27/84 w/copy to entire court.

5/11/84 — ORDER granting motion E-49. A's response to pet. for rehearing due 5/21/84 (BMM;jd) Copy to counsel.

5/23/84 — ANSWER of A to petition for rehearing and suggestion for rehearing en banc filed (SAW;jm) Transmitted to HLW, FDM, JDB w/copy to all circuit judges on 5/25/84.

5/29/84 — ORDER denying petition for rehearing and suggestion for rehearing en banc of Es, filed (LYD:gac).

FIRE AND POLICE EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF BALTIMORE

Article 22, § 34(a) 1-4, Baltimore City Code (1983):

34. Benefits.

(a) *Service retirement benefits.*

(1) Any member in service may retire upon his written application to the Board of Trustees setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided that the said member at the time so specified for his retirement shall have attained the age of fifty or shall have acquired twenty-five years of service as an employee, and notwithstanding that, during such period of notification, he may have separated from service.

(2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.

(3) Anything in this subsection to the contrary notwithstanding, any employee who becomes a member at the time of the establishment of this system, and who is fifty-five, or more years of age, or who will attain the age of fifty-five years before having twenty-five years of service, may be continued in service until the completion of twenty-five years of service, or the attainment of age sixty-five, whichever occurs first.

(4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

EMPLOYEES' RETIREMENT SYSTEM OF THE
CITY OF BALTIMORE

Article 22 § 3(f), Baltimore City Code (1983):

3. Membership.

(f) *Retirement.* The services of any employee, except an elected or appointed official whose term is fixed by law, who attains or has attained the age of seventy (70), and who is not a member of this system shall terminate forthwith. Any member in service who has attained the age of seventy (70), shall be retired forthwith or on the first day of the calendar month next succeeding that in which the said member shall have attained the age of seventy (70) years. However, if the member is an elected or appointed official whose term is fixed by law, he may remain in service as a contributing member subject to the provisions of Section 8(a) until he is not reelected or reappointed.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTERNAL MEMORANDUM

August 14, 1980

MEMORANDUM

TO: Leroy D. Clark
General Counsel

FROM: Constance L. Dupre
Associate General Counsel
Legal Counsel Division

SUBJECT: Whether age limitations placed by state and local governments on the employment of police and firefighters are justified by empirical evidence.

Introduction

This memorandum will discuss the propriety of allowing state and local governments to use maximum entry-level age restrictions and mandatory retirement for police and firefighter personnel. The issue arises in the context of the Commission's review of the enforcement policy of the Department of Labor (DOL) with regard to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* In 1978 the administration and enforcement of the ADEA was transferred from the DOL to the Commission by Reorganization Plan No. 1 of 1978. (*See 43 Fed. Reg. 19807.*)

The DOL took the position that arbitrary age restrictions placed on the employment of police and firefighters by state and local governments constituted a violation of the ADEA, primarily because the government employers could not meet the BFOQ test of Section 4(f)(1) of the Act. Accordingly, the DOL had an active enforcement policy against such age restrictions, particularly when a maxi-

mum entry-level age requirement was being used. The position of many state and local governments, on the other hand, is that maximum and minimum hiring ages and a mandatory retirement age are "bona fide occupational qualifications, reasonably necessary to the normal operation of their particular business."¹ (Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1)). The DOL litigation experience indicates that courts have often been reluctant to deny use of age restrictions where public safety is an issue.² To forestall further judicial approval of hiring and firing limitations that do not meet the BFOQ test, it has been suggested that the Commission institute, pursuant to its rulemaking authority, Section 9 of the ADEA, 29 U.S.C. § 628, an exemption for state and local governmental hiring and retiring limits for the protective occupations. The rationale for providing such an exemption would be that the Commission, by recognizing a

¹ The studies currently available to us do not contain comprehensive statistics on the use of age limits by State and local governments. Generally, however, the upper age limits for hiring range from 32-40 years of age, with the average maxima being age 34. On the other end of the spectrum, a recent survey of 100 large cities shows that 83% use compulsory retirement, generally ranging from ages 50-55. See Flynn & Silver, *Police Selection*, p. 47. While age limitations for both police and firefighters are common practice, there are notable exceptions in both fields, and a lack of uniformity, even from municipality to neighboring municipality.

² See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (age 40 hiring limit for bus drivers); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied *sub nom. Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975) (age 35 hiring limit for bus drivers). The case law in the protective service occupations has been less consistent. See *Rodriguez v. Taylor*, 420 F. Supp. 893 (E.D. Pa. 1975) (41 hiring limit for private police invalid as BFOQ); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976) motion for reconsideration denied, 424 F. Supp. 1238 (E.D. Ark. 1976) (mandatory retirement at 62 for firefighters not justified under BFOQ test). But see *Arritt v. Grisell*, 421 F. Supp. 800 (N.D. W. Va. 1979) (maximum entry age of 35 for police upheld).

reasonable set of age limitations, would be in a better position to challenge age limitations that are overly restrictive, arbitrary, patently unrelated to public safety considerations, and unjustified by available evidence on job-related physical performance requirements.

The question that this memorandum addresses is whether there is evidence to support the Commission giving limited approval, in the form of an exemption, to certain age restrictions for the employment of police and firefighters. The corollary is whether such a compromise is necessary. In response to the latter question, this memorandum will focus on the major alternative to an exemption, i.e., guidelines on individualized testing, and will suggest that job-related physical performance examinations for police and firefighters are a feasible alternative to using chronological age as the sole criterion for restricting the years of employment.

Review Of Relevant Data

The relationship between age and job performance has been addressed in scientific investigations both public and private. This office undertook an informal review of the research material available within the Commission, contacted other federal agencies that have developed expertise in the field of the protective occupations, and received comments and studies from concerned state and local governments. This memo will review the materials from federal, state, and local law enforcement and firefighting agencies, and from experts in the field (Appendix A). This memo will further state what conclusions are supportable by available data, and will make recommendations.

The burden on the Commission to justify enforcing the provisions of the ADEA with respect to state and local governments is not eased by similar age restrictions being available by statute to federal law enforcement and

firefighting agencies. Several months after the 1974 amendments to the ADEA were passed, extending coverage to federal, state and local government employees, Congress passed a law providing that an agent to be named by the President was authorized to approve maximum hiring ages for federal law enforcement and firefighter personnel, and that retirement for such personnel would be mandatory at age 55 or after 20 years service. See Title 5 of the U.S. Code, entitled *Government Organization and Employees*, Sections 3307(d) and 8335(g). Congress justified the state/federal differential with respect to police and firefighters by saying that the entry-level age restrictions are interrelated with and justified by the provisions which authorize early retirement, mandatory retirement and liberal annuity benefits for the same employees. The rationale appears to be that the federal government can insure that when a mandatory retirement age is imposed on certain federal employees in the interest of public safety, the employees thus restricted are liberally compensated. Such a balance may not be struck by local and state governments and thus age restrictions are disallowed, at least without a showing that age is a BFOQ. See S. Rep. No. 93-948, 93rd Cong., 2nd Sess., reprinted in [1974] U.S. Code Cong. Ad. News 3699-3701.

The Civil Service Commission, now Office of Personnel Management, although designated agent to oversee the granting of entry level age restrictions for federal sector firefighters and law enforcement officers, is not comfortable with these provisions and has issued a report to that effect, as has the GAO. These reports will be discussed later in this memorandum. Much of the criticism from within the federal government is useful in rebutting the arguments made for the use of age restrictions on the state and local level. Therefore, we have included in this memorandum material relating to federal age restrictions.

The Commission contracted for a study entitled *Police Selection: Maximum Age Standards: A Review*, by E. Flynn and I. Silver. This study focuses on dispelling the preconceptions surrounding the hiring and retaining of older police personnel. The study cites data on the performance of older police personnel that rebuts many assertions made by proponents of the use of age restrictions.

First, the study points out that police work is a service occupation, not primarily law enforcement in the sense of crime-fighting. The average police person has only an "occasional dangerous event," and in that situation, presence of mind, maturity, good judgment, and even self-esteem, are more important factors to predict successful outcome than physical strength.

This study is a compendium for other studies done on the factors that are a good index of a successful law enforcement career. The primary conclusion is that restricting the entry-level age has no bearing on the future success of the applicant. The conclusions are that there are no reasons to exclude related experience as a hiring factor, that success in the former employment (for instance, armed forces) is an indicator of continued good performance, that older police have a lower rate of civilian complaints, that cities with no maximum hiring limit do not have a higher crime rate, and that older police have a lower rate of absenteeism and turnover.

The study concludes that the stereotypes that pertain to hiring older persons in general — that they are previous occupational failures, unstable, hard to train, incapable of accepting discipline, and physically sub-par, — abound in police literature, but have no basis in fact and have no bearing on the actual performance levels of police personnel. This study further examines the argument that police work itself is so arduous that it necessitates early

retirement. Flynn & Silver point out that police personnel are overweight, have ulcers, bad backs and cardiac problems. These physical problems do not stem from constant fear of danger or from strenuous activity, but rather from the basically sedentary nature of the work and the stress involved in the internal workings of the criminal justice system.

The conclusion of this study is that the arguments used to justify age restrictions do not relate to the physical requirements of the occupation but rather to bureaucratic concerns about the type of recruit (i.e., that young and malleable recruits are desirable) and various pension considerations.

Dispelling The Aging Myth, a report prepared for the Commission by Dr. Paul Davis, provides strong support for the proposition that there are accurate and economical ways to test physical fitness and predict levels of performance for occupations that require strenuous activity, without resort to using age per se as a criterion. Unlike the Flynn & Silver conclusion, that the need for physical prowess in policeman is mythical, Davis believes that firefighters do need to meet a minimal level of fitness. His assertions are somewhat belied by his figures, which show the average firefighter is only marginally more fit than the average American. However, putting aside for a moment the consideration of what standard should be required, the least that the Davis material does is establish that individualized testing is feasible, that firefighting requirements can be quantified, and that an acceptable level of performance can be predicted from test results.

Davis has done studies for the development of a job-related physical performance examination for firefighters for the National Fire Prevention and Control Administration, and has written extensively on the

subject. In one article, Davis not only lists the tests for fitness and coronary risk factors, i.e., EKG-stress test, blood analysis for heart disease risk, pulmonary function, body composition analysis and neuromuscular assessment, but also does a cost analysis on providing a testing and fitness program to lower the rate of premature disabilities, primarily for cardio-pulmonary disease and back injuries associated with excessive body weight. Davis' point is clear: maintaining adequate fitness testing and maintenance not only obviates the necessity to use arbitrary age limits in hiring and retiring, but is cost effective in terms of personnel expenditures for the state or local government.

A telephone call to Dr. Davis provided further information on the current status of testing for firefighting and police personnel. Dr. Davis believes that his extensive testing of active firefighters provides a sufficiently job-related test to make individual predictions with a considerable degree of reliability, albeit that few of those tested have been over age 50. Dr. Davis is less positive about the accuracy of his police personnel test, apparently because it is less tested and keyed not to age, but to sex BFOQ considerations.

Doctor Davis' work seems to indicate that substantial numbers of males in the protective occupations, and at least some of their female counterparts, will be able to pass his tests up to ages 65-70.

The Davis material does show that there is a correlation between advancing age and declining performance, but the decline is more accurately attributed to factors such as increased weight and tobacco consumption, not age. David notes that there are many fit older firefighters who are as qualified as their younger counterparts on the testing level, which supports the proposition that age-blind criteria will weed out the unfit without unduly impairing

the employment opportunities of qualified older individuals. The Davis material casts doubt both on the notion that all or substantially all individuals over a certain age are unqualified, and on the notion that the disqualifying factors are undetectable.

These findings are corroborated by the draft report submitted to the Commission by Donna Cohen and Carl Eisendorfer. Their report, entitled *Police Aging: A Study of Health and Behavior*, attempts to evaluate whether there is any empirical basis for the use of a maximum entry-level age as a selection criterion for police officers. One finding that Cohen and Eisendorfer point to is that the functional age profile showed a marked increase in variation with chronological age, which is further support for the notion that arbitrary age limits do not exclude a group of uniformly unqualified individuals. With numerous references to other studies on alternatives to using chronological age to predict performance, the study concludes that not only is age a less accurate indicator of acceptable job performance than other physiological and psychological variables, but that it is often a positive performance factor.

Cohen and Eisendorfer reiterate what is generally accepted to be true: that scientifically ascertainable factors such as hypertension, although often associated with age, are better predictors of performance standing alone than is age *qua* age.

Reports and Comments From Other Federal Agencies and From State And Local Governments

This office requested copies of reports from the GAO and from OPM, and received informal comments from other agencies. Various state agencies have indicated that studies are being undertaken to support age restrictions currently in use and that they will supply the Commission with their findings. The Commission received a report

from the California Highway Patrol, prepared in defense of its entry level age restrictions and mandatory retirement policy. It relies on the comparable federal restrictions for support and on qualitative data from personal interviews with protective service personnel to illustrate the position that these occupations require youthful incumbents. The state and local agencies have only recently been predicated their defense of age limits on the issue of public safety. It appears that they have yet to develop sophisticated statistical defenses that will be necessary to support the age BFOQ's in the protective occupations. The California report raises one issue of concern, that night vision deterioration supports early retirement of highway patrol persons. However, included in the discussion are strong indications that there are available tests to ascertain when any one individual has fallen below an acceptable level.

The GAO report, *Special Retirement Policy For Federal Law Enforcement and Firefighter Personnel Needs Re-evaluation*, is critical of the current availability of age restrictions in the Federal Government. The criticisms are equally applicable to similar age restrictions used by state and local governments.

The report specifically addresses the question of alternatives to retirement, e.g., individualized testing, and reiterates the position that age restrictions must be job-related in the sense of public safety, not job-related to management considerations.

The GAO came to several conclusions. Although this report is not directed toward state and local community fire departments, it does provide some useful data on older firefighters in general. With respect to federal firefighters, for instance, the GAO report recommends that they be dropped from the early retirement program (ERP) altogether. The report cites statistics that show that because

firefighting is seasonal, many firefighters are not covered by pension plans that have an ERP, and work beyond the age set for covered workers without significant effect on their performance.

This report reiterates that federal age restrictions provide a shorter, more lucrative career for covered employees, thus constituting an "invaluable recruitment and retention vehicle," while being patently unfair to other government employees. The report comes to some of the same conclusions as the OPM report: that additional compensation for hazardous duty should be reflected in pay, not retirement benefits; and that if an employee becomes physically unable to continue performing the duties of his or her job, then he or she should be retired according to accepted disability practices that operate on a case-by-case determination.

The OPM position seems to be that the special retirement policy for federal law enforcement and firefighter personnel resembles disability retirement but the individual employee is not required to show disability. The OPM administrator noted that the special benefits that offset the age limitations are now offered for jobs needing "youthful vigor," whereas the jobs were formerly deemed "hazardous," a distinction that indicates that the age limits have little to do with public safety, and more to do with workforce considerations, i.e., attracting young, career-oriented individuals into government service.

The OPM report, *Staff Paper on the Early Retirement Policy for Federal Law Enforcement and Firefighter Personnel*, questions the need for a preferential early retirement plan (ERP) for law enforcement and firefighter personnel. This report states that the program was originally designed as an incentive for career service, and to foster a youthful workforce for reasons unrelated to the actual physical requirements of at least some of the

protective occupations. The report cautiously recommends retaining the program but with more specific criteria based on job-related physical requirements, thus eliminating the use of the ERP as a career incentive. The report specifically recommends that individuals who gravitate to nonhazardous positions, i.e., supervisor or administrator, be required to fulfill the same civil service requirements for retirement as all federal employees not engaged in hazardous duties.

The study suggests as a solution that higher pay accompany hazardous duty rather than the employee being compensated after retirement. The stated goal of the proposal is to return to what was originally intended — that extraordinary duty that caused an employee to "burn out" would be accompanied by a provision for early retirement. The study makes page after page of alternative proposals all of which have a common theme: that new legislation is required that will restrict automatic separation to those positions which truly require a physically fit incumbent, and that "hazardous" should be the appropriate classification for such occupations.

Other agencies' reactions run according to their use of age restrictions. Departments of Justice and Treasury are in the forefront of those who still believe such restrictions are necessary. It is significant that the Law Enforcement Assistance Administration and the U.S. Fire Administration, on the other hand, support the notion that individualized testing is possible and desirable.

Conclusions On Entry-Level Age Restrictions

The available data indicate that entry-level age restrictions for police and firefighters are not necessary for public safety and that their use as a management tool should be regarded as a violation of the ADEA. The materials in Flynn and Silver, the GAO report, the legislative history of the ADEA, and Davis' work all state

that the primary reason for entry-level requirements is that such restrictions insure a "full career" for pension purposes.

Flynn and Silver point out a subsidiary rationale: that younger applicants fit into the paramilitary mold, are perceived as more easily trainable, less independent. However, Flynn and Silver also point out that the younger police officers, nevertheless, have a higher rate of civilian complaints, a finding that casts doubt on the advisability of denying older, experienced applicants a position.

It should be noted, however, that there are three arguments made in support of entry-level age restrictions that need to be addressed. The first is that such restrictions are necessary to provide a training period that will result in a longer period of qualitatively better performance. The Flynn and Silver study addresses this question directly, as do Cohen and Eisendorfer. The available data indicates that prior experience in a related field is a more than adequate substitute for a specific training period within the occupation. This finding holds true for all of the protective occupations.

The second argument raised in support of entry-level age limitations has to do with predicting physical performance on the basis of risk factors. An individual aged 40 might be able to pass a battery of physical tests designed to estimate his current strength and stamina, but that individual might have in his or her medical record one or more of the factors that correlate to an increased chance of future physical disability, i.e., family history of cardiac disease, hypertension, use of tobacco, etc. For example, an individual aged 55-69 with less than two risk factors has a .69% chance of coronary heart disease, whereas an individual below age 55 but with more than two risk factors present has a 1.29% chance. Leaving aside the question of what percent constitutes a

sufficient basis to raise public safety considerations, the Commission could take the position that an older individual who passed the physical but who was in a high risk category might be denied employment without violating the ADEA, providing that the same standard would apply to younger applicants as well, and the determinations were made on a case-by-case basis, as are disabilities.

The third argument raised is that the cost to the community, in terms of paying disability and retirement costs for hiring an older applicant, is prohibitive. While the Commission should be sensitive to the fiscal concerns of state and local governments, there is sufficient flexibility in the treatment of employee benefit plans under Section 4(f)(2) of the ADEA to accommodate the hiring of older applicants.³ The Commission has currently adopted the DOL's interpretation covering age-based reductions of benefits based on actuarially significant cost considerations, and this provision will remain when the Commission's own interpretations are promulgated.

The studies reviewed generally conclude that entry-level age restrictions are not supported by any empirical basis relating such restrictions to individual performance or public safety. It therefore appears that an exemption for state and local governments is unwarranted.

Conclusions On Mandatory Retirement

The reports and data we have been able to review indicate that while there is convincing evidence that firefighting is an arduous occupation, requiring a certain level of physical fitness, that fitness can be easily measured; that while age is a predictor, other physical factors such as body composition, hypertension, etc. are

³ The report submitted by the California Highway Patrol raises questions of state law that will increase the expense of hiring older applicants. This issue, however, would be more properly addressed at another time.

more accurate indicators; and that there is no longer a need to mandatorily retire those over a certain age.

In terms of the judicially created 3 prong test to establish a BFOQ, the data indicates that even if a certain level of physical fitness is reasonably necessary, there are substantial numbers of older individuals who still qualify, and there are simple and accurate means both to determine current physical condition and to predict future performance levels.⁴

The evidence on the necessity for any arbitrary age restrictions for the occupation of law enforcement officer appears unconvincing. The asserted need for police personnel to be physically fit is belied by the statistics set forth in several of the studies reviewed which show policemen to be, on the whole, fraught with heart and back problems related to the sedentary nature of their employment. The intermittent occurrences requiring physical exertion do not appear to require a youthful police force. Rather, the studies contend and present data to support the view that maturity is an asset in conflict resolution. In addition, while there may be a need to test and control the physical capabilities of foot patrol persons, or the visual acuity of highway patrol persons, these requirements should not be allowed to control the employment of supervisory or administrative personnel. See *EEOC v. City of Janesville*, 480 F. Supp. 1375 (W.D.

⁴ The three part test is 1) that safety is the "essence" of the business, 2) that "all or substantially all" individuals above a certain age possess the disqualifying trait, and 3) that the trait itself is unascertainable on an individual basis. While Congress recognized these elements of the BFOQ test (see S. Rep. No. 95-493 discussed on p. 16 *infra*), it should be noted that the burden of proof on the employer is lighter where public safety is in issue. In the often cited *Hodgson* decision, *supra* n.2, the Seventh Circuit upheld a BFOQ supported only by the employer's good faith judgment that public safety would be effected.

Wisc. 1979). Further, physical performance levels can and should be determined on a case-by-case basis.

As the Silver and Flynn study illustrates, being a police officer is essentially a public service occupation where successful performance is predicated on personal characteristics often unrelated to physical strength, and those individuals who become physically unfit to perform the duties of their position can be retired according to accepted disability procedures.

Conclusion

The available data provide information to answer two questions. One, are higher than average physical fitness standards necessary for police and firefighters? And, if so, are there tests available that will adequately measure the physical requirements of the job? The answer to the latter appears to be yes and the answer to the former is that there is evidence relating to those currently in these occupations indicating that the job requirements are not as stringent as the proponents of age restrictions would have us believe.⁵ Further, legitimate qualifications for these jobs can more accurately be treated as reasonable factors other than age, rather than age as a bona fide occupational qualification.

In sum, statistics appear to be available that can rebut assertions that there are stringent physical demands for police and firefighters that mandate age restrictions. The current physical fitness levels, often tested, and the lack of

⁵ The proponents of the use of age limits have moved from emphasizing physical condition to asserting that the cognitive function deteriorates with accumulated stress and other factors compounded by the aging process. The new emphasis is less susceptible to categorical proof, hence will be more difficult to refute. However, the studies the Commission currently has before it indicate that there is a growing statistical data base that illustrates that experience and maturity more than off-set any deterioration due to aging in a decision situation.

uniformity among state and local governments provide data that substantiate the claim that many older people are physically capable of performing the duties of the various law enforcement and firefighter occupations.

The material we have reviewed would not generally support the Commission in retreating from the position that using chronological age as the sole criterion for denying an individual an employment opportunity violates the ADEA. Even in occupations where age roughly correlates with other physiological factors that do constitute bona fide job-related limitations, there are objective criteria that perform the limiting function more accurately, and without running counter to the intent of the ADEA. Thus, for the Commission to offer an exemption to state and local governments would be to perpetuate arbitrary limits where individualized testing appears to be a feasible alternative.

Recommendations

A. The Commission could consider issuing BFOQ guidelines to which state and local governments could refer on hiring and retiring personnel in the protective occupations, with reference to physical and other types of testing, if relevant to job requirements, and employee benefit planning. There is no reason why age cannot be considered as part of the risk factor analysis on an individual basis, but it can be eliminated as the sole criterion without affecting public safety. There appears to be available a sufficient data base and expert testimony to support holding all private and public employers to the same standard when an age restriction is imposed on employment. In addition, Congress expressly indicated that guidelines would be appropriate to aid employees in determining whether they met the BFOQ standard. See S. Rep. No. 95-493, 95th Cong., 2nd Sess., 10-12, reprinted in [1978] U.S. Code Cong. & Adm. News 513-514.

BFOQ guidelines would be preferable either to *ad hoc* litigation or *ad hoc* exemption grants for the reason that the process would conform with generally accepted anti-discrimination principles, i.e., that the burden of proof not be on the individual complaining of discrimination, and that the facts of the particular employment situation be controlling.

If the Commission decides that guidelines would be ineffective, or otherwise undesirable, then it is recommended that we use our rulemaking authority to create an exemption. Such an exemption should include a personal exemption for individual employees and applicants who consider themselves qualified. For example, a similar exemption for individuals is contained in the FAA regulations, although often sought by pilots and never granted. See 14 C.F.R. § 121.381 (the rule) and 14 C.F.R. § 11.25 (the exemption). The danger with using an exemption is that the Commission would be locked into a position that sets an unwelcome precedent. We would be holding ourselves out as an agency with sufficient expertise to establish reasonable age limits, and we would be establishing a presumption in favor of an employer-sought age restriction. However, an exemption within an exemption with a sliding scale and risk factor analysis would create a defensible position.

It is recommended that the Commission coordinate its efforts with the LEAA and the U.S. Fire Administration, other federal agencies that regulate the protective occupations and which have expressed their support for individualized testing replacing arbitrary restrictions of all kinds: age, sex, height, etc.

In addition, it is recommended that the Commission join with GAO and OPM in making known its opposition to the continued use of age restrictions by the federal government for reasons unrelated to public safety. Until such

time as the federal restrictions are lifted, state and local governments will continue to rely on them to substantiate their own age limitations.

APPENDIX A

Resources

1. Flynn and Silver, *Police Selection Maximum Age Standards: A Review*.
2. *Dispelling the Aging Myth*, a report for EEOC by Paul Davis, Director of the Institute of Human Performance. (In addition, various articles by Davis from police and firefighter publications).
3. *Standards in Police Selection*, National Advisory Commission, and pertinent official reports.
4. *State Traffic Officer Max Entry Age Standard Study*, California Highway Patrol (and other enforcement employment data).
5. GAO Report — *Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation* by the Comptroller General. (1977).
6. National Criminal Justice Research Service — 11 reports available on Max Entry level age requirements.
7. *Physical Fitness — II (Legal Points)* police publication of IACP.
8. *The Development of Job-Related Physical Performance Examinations for Firefighters* (a study funded by U.S. Fire Administration).
9. Bureau of Retirement, Insurance, and Occupational Health — (OPM) *Staff Paper on The Early Re-*

tirement Policy for Federal Law Enforcement and Firefighter Personnel.

10. *Police Aging: A Study of Health and Behavior*, (in draft) D. Cohen and C. Eisendorfer.

**AFFIDAVIT OF EDWARD C. HECKROTTE, SR.
WITH SURVEY**

STATE OF MARYLAND:

COUNTY OF BALTIMORE: TO WIT:

AFFIDAVIT OF EDWARD C. HECKROTTE, SR.

Edward C. Heckrotte, Sr., being duly sworn, deposes and says:

I am over 18 years of age, competent to be a witness in these proceedings and I have personal knowledge of the facts herein.

I reside at: 5928 Glennor Road, Baltimore, Maryland, 21239.

I am President of Baltimore Fire Fighters, Local 734, IAFF (AFL-CIO) and have held said office since June 20, 1978. Previously, I served as President of said local from 1972 to 1975.

I am also a trustee of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore and have been a trustee of that system since June 1968. In addition to performing the normal duties required of a trustee, during these years I also have served and been active as Chairman of the Special Investment Committee and also as Chairman of the Actuarial Study Committee of the Board.

On or about January 5, 1981 I sent the attached letter marked as Exhibit A with its questionnaire to all locals of the International Association of Fire Fighters whose membership consisted of over 100 firefighting personnel. I mailed 261 of these questionnaires.

On or about December 31, 1980 and January 21, 1981, I sent the attached letter marked as Exhibit B with its

questionnaire to each state retirement system and to the retirement systems of large cities and populous counties in the United States. My mailings to the state, county and city retirement systems were based on the "Money Market Directory, 1980" published by Money Market Directories, Inc. The directory is regularly used by the Employees Retirement System and the Fire and Police Employees Retirement System of Baltimore City and by their investment managers, advisors and actuaries. I mailed 166 of these questionnaires.

The results of my mailings as of this date, are as follows:

1. Of the 261 questionnaires sent to IAFF unions, 124 were completed and returned.
2. Of the 50 questionnaires sent to state retirement systems and the District of Columbia, 36 were completed and returned.
3. Of the 116 questionnaires sent to county and city retirement systems, 65 were completed and returned.
4. The total number of questionnaires mailed were 427. The total number of questionnaires completed and returned were 225.
5. Based on the replies received, the information reveals the following:

- a. Systems requiring mandatory retirement at respective age:

70	— 29
69	— 0
68	— 2
67	— 0
66	— 0
65	— 61
64	— 3

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63	— 3
62	— 8
61	— 0
60	— 27
59 or below	— 1 (age 55 — Balto.)

b. Systems which have no mandatory retirement age: 33.

c. Number of systems requiring mandatory retirement at different ages based on rank: 6 (all differences being at levels of District Chief, Battalion Chief, Deputy Chief or Chief of Fire Department).

Further, I have prepared a chart showing the mandatory retirement age of firefighters in the 30 largest U.S. cities. Marked as Exhibit C and attached hereto is a copy of a portion of a news article from The Sun of December 19, 1980 listing the 30 U.S. largest cities based on the official 1980 Census. The chart prepared from the information in my survey is attached as Exhibit D. The summary of the results of the 30 largest U.S. cities is as follows:

<i>Mandatory Retirement Age</i>	<i>Number of Cities</i>
70	5
68	1
65	12
64	1
63	2
60	4
No mandatory age	4
Balto. (ages 60 and 55)	1

Only one city in the above group has a different mandatory retirement age based on rank. That is, Pittsburgh which has no mandatory retirement age for the Deputy Chief and Chief and age 65 for all others. Boston has not replied but I have ascertained from other replies

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received by me from Massachusetts that Boston's fire-fighters are covered by a state law requiring mandatory retirement at age 65.

EDWARD C. HECKROTTE, SR.

Subscribed and sworn to before,
me this 24th day of March, 1981

Doris A. Schott
Notary Public

My Commission Expires: 7/1/82

EXHIBIT A

BALTIMORE FIRE FIGHTERS
LOCAL No. 734

Chartered October 20, 1942

305 W. Monument Street, Suite 310
Baltimore, Maryland 21201
837-4043 or 837-3358

December , 1980

Dear

As President of Baltimore City Fire Fighters, Local 734, IAFF, I am requesting you to complete and return to me as soon as possible the attached questionnaire.

This questionnaire is being sent to every president of a major IAFF Local and the results will be used by me in pending litigation in the U.S. District Court for the District of Maryland in which a number of members of our local have brought suit against the Mayor and City Council of Baltimore under the Age Discrimination in Employment Act.

It is *very important* that the requested information be provided to me and that your answers be *accurate*. In the event that you cannot complete the questionnaire accurately, please refer it to some member of your local who is familiar with the requested information and who can answer with accuracy. Also, since I anticipate using this information in court, it will be necessary for the answer to be acknowledged before a Notary Public.

Thank you in advance for your anticipated cooperation.

Fraternally,

EDWARD C. HECKROTTE, SR.

P.S. If you have any questions about this request, the questionnaire or the use to which this information will be put, please call me and reverse the charges (301) 837-4043 or 837-3358.

E.C.H.

(FOR USE IN LITIGATION IN CASE OF JOHNSON v. MAYOR & CITY COUNCIL OF BALTIMORE, U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND)

RETURN TO: Edward C. Heckrotte, Sr., c/o Local 734
305 W. Monument Street
Baltimore, Maryland 21201

1. Full name, number and address of local union:

2. City, town, municipality, county, district or other governmental unit or area for which it provides firefighting services: _____

3. Number of uniformed employees in your Department:

4. Are the uniformed employees within your Department required by statute, ordinance, state or local law, rule, regulation or collective bargaining agreement to be mandatorily retired at a certain age: Yes ___ No ___

5. If the answer to No. 4 is Yes, at what age is mandatory retirement required? Age ___

6. If mandatory retirement is required at different ages, indicate what ages and which employees: _____

7. Is mandatory retirement age based on rank in Department? Yes ___ No ___

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8. If the answer to No. 7 is Yes, state the mandatory retirement age for the following ranks:

- a. Firefighters (including drivers, pump operators, engineers, tillermen, paramedics, etc.) Age ____
- b. Sergeants: Age ____
- c. Lieutenants: Age ____
- d. Captains: Age ____
- e. Battalion Chiefs or District Chiefs: Age ____
- f. Deputy Chiefs: Age ____
- g. Others: _____

(Signature)

(Title and/or Office)

STATE OF _____, COUNTY OF _____ : to wit:

I HEREBY CERTIFY, that before me, the subscriber, a Notary Public of the County and State aforesaid, personally appeared _____
of the _____ Fire Department, who made oath in due form of law that the matters and facts herein set forth are true and correct to the best of his knowledge, information and belief.

Notary Public

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EXHIBIT B

BALTIMORE FIRE FIGHTERS

LOCAL NO. 734

Chartered October 20, 1942

305 W. Monument Street, Suite 310

Baltimore, Maryland 21201

837-4043 or 837-3358

December , 1980

Dear

As a Trustee of the Fire and Police Retirement System of Baltimore City, I am respectfully requesting your assistance and cooperation in a project in which I am engaged pertaining to mandatory retirement age of uniformed fire department employees. I would like you to complete and return to me as soon as possible the attached questionnaire.

This questionnaire is being sent to every state retirement system, and the results will be used by me in pending litigation in the U.S. District Court for the District of Maryland (Case No. H 79-998) in which a number of employees of the Baltimore City Fire Department have brought suit against the Mayor and City Council of Baltimore under the Age Discrimination in Employment Act.

It is *very important* that the requested information be provided to me and that your answers be *accurate*. Since I anticipate using this information in court, it will be necessary for the answer to be acknowledged before a Notary Public.

Thank you in advance for your anticipated cooperation in this effort.

Sincerely,

EDWARD C. HECKROTTE, SR.

P.S. If you have any questions about this request, the questionnaire or the use to which this information will be put, please call me and reverse the charges (301) 837-4043 or 837-3358.

E.C.H.

(FOR USE IN LITIGATION IN CASE OF JOHNSON v.
MAYOR & CITY COUNCIL OF BALTIMORE, U.S.
DISTRICT COURT FOR THE DISTRICT OF MARY-
LAND)

RETURN TO: Edward C. Heckrotte, Sr., c/o
Baltimore City Fire Fighters, Local 734
305 W. Monument Street
Baltimore, Maryland 21201

1. Full name and address of retirement system: _____
2. Number of uniformed fire department employees covered by your system: _____
3. Are the uniformed fire department employees covered by your system required to be mandatorily retired at a certain age: Yes ____ No ____
4. If the answer to No. 3 is Yes, at what age is mandatory retirement required? Age _____
5. If mandatory retirement is required at different ages, indicate what ages and which employees: _____

6. Is mandatory retirement age based on rank? Yes ____ No ____
7. If the answer to No. 6 is Yes, state the mandatory retirement age for the following ranks:
 - a. Firefighters (including drivers, pump operators, engineers, tillermen, paramedics, etc.) Age ____
 - b. Sergeants: Age ____
 - c. Lieutenants: Age ____
 - d. Captains: Age ____
 - e. Battalion Chiefs or District Chiefs: Age ____
 - f. Deputy Chiefs: Age ____
 - g. Others: _____

(Date)

(Signature)

(Title and/or Office)

STATE OF _____, COUNTY OF _____ : to wit:

I HEREBY CERTIFY, that before me, the subscriber, a Notary Public of the County and State aforesaid, personally appeared _____ of the _____ Retirement System, who made oath in due form of law that the matters and facts herein set forth are true and correct to the best of his knowledge, information and belief.

Notary Public

EXHIBIT C

THE SUN, FRIDAY, DECEMBER 19, 1980

Baltimore falls from 7th to 9th
in new census

* * * summer, it appeared that Baltimore might be in danger of dropping out of the top 10 cities. Preliminary counts indicated a population of 737,000, but subsequent rechecks put the city's population at more than 780,000.

The city took the Census Bureau to court, alleging an undercount and asking that the agency be ordered to keep open its offices in the city. Although the city won a delay in closing the local offices, census officials contended that the additional count was the result of scheduled checks that would have turned up those people anyway.

The undercount — if there is one — will not alter one basic fact, however: The nation's population is shifting to the Sun Belt, and those states will gain seats in Congress.

In Baltimore, city residents will find themselves sharing their congressional representatives with county residents. Instead of having one district wholly within the city's borders (the 7th), the bulk of another (the 3d) and a small portion of a third (the 2d), the city will have 1½ districts or a major portion of two.

According to the figures released yesterday, the biggest gainers since the 1970 census were cities of the Southwest and California.

El Paso, Texas; Phoenix; San Francisco, and San Jose, Calif., outpaced other cities in growth, according to a list of the nation's 30 most populous communities.

Jumping four places to make the top-30 list for the first time, El Paso placed 28th in the country, with a population of 424,522, bureau officials said.

Here are the 30 most populous cities, with their 1980 total listed first and their 1970 total listed second:

1. New York (final total not available yet, 7,895,563)
2. Chicago (2,999,570; 3,369,357)
3. Los Angeles (2,950,010; 2,811,801)
4. Philadelphia (1,680,235; 1,949,996)
5. Houston (1,554,992; 1,282,443)
6. Detroit (1,192,222; 1,514,063)
7. Dallas (901,450; 844,621)
8. San Diego (870,006; 697,471)
9. Baltimore (783,320; 905,787)
10. San Antonio (783,296; 708,582)
11. Phoenix (781,443; 589,016)
12. Indianapolis (694,040; 740,000)
13. San Francisco (674,063; 715,674)
14. Memphis (644,838; 657,007)
15. Washington (635,185; 756,668)
16. Milwaukee (632,989; 717,372)
17. San Jose (625,763; 461,212)
18. Cleveland (572,532; 750,879)
19. Boston (562,118; 641,071)
20. Columbus, Ohio (561,943; 540,025)
21. New Orleans (556,913; 593,471)
22. Jacksonville, Fla. (541,269; 528,865)
23. Seattle (491,897; 530,831)
24. Denver (488,765; 514,678)
25. St. Louis (448,640; 622,236)
26. Kansas City, Mo. (446,562; 507,330)
27. Nashville (439,599; 447,877)
28. El Paso (424,522; 322,261)
29. Pittsburgh (423,962; 520,089)
30. Atlanta (422,293; 495,035).

This article was compiled with assistance from the Associated Press.

EXHIBIT D

RETIREMENT AGES OF FIRE DEPARTMENT PERSONNEL IN 30 LARGEST U.S. CITIES

Name of City and Population	Number of Fire Dept. Personnel	Mandatory Retirement Age, if any	Difference in Retirement Age, based on rank, if any	Source of Information (Union or Retirement System)
New York 2,950,010	12,000	65	No	New York Retirement System and Local 94
Chicago 2,999,570	4,600	63	No	Chicago Firemen's Annuity & Benefit Fund (Retirement System)
Los Angeles 1,680,235	2,870	No mandatory retirement age 70 (possible 72 upon request)	No	Retirement System and Local 112
Philadelphia 1,554,992	2,791	65	No	Local 22
Houston 1,192,222	3,000 (2,900)	60	No	Retirement System and Local 341
Detroit 901,450	1,325 (1,400)	70 (Retirement System) 65 (Local)	No	Retirement System and Local 344
Dallas 870,006	1,481 (1,500)	70	No	Retirement System and Local 617
San Diego 783,320	729	55-60-65	Yes	Local 145
Baltimore	1,987	65	Lieutenants and above — age 65	See Local Ordinance
San Antonio 783,296	1,030	65	No	Local 624
Phoenix 781,443	833	No mandatory retirement age	No	Local 493
Indianapolis 695,040	859	65	No	Local 416
San Francisco 674,063	(1,500) 1,475	65	No	Local 798 and Retirement System

Memphis 644,838	(1,480) (1,500)	60	No	Local 1784 and Retirement System
Washington 635,185	1,450	64	No	Local 36
Milwaukee 632,989	1,048 (1,029)	63	No	Retirement System and Local 215
San Jose 625,763	No Reply		No	
Cleveland 572,532	900	65 (with extension)	No	Local 92
Boston 562,118	Unknown	65	No	State Law
Columbus, Ohio 561,943	812	No mandatory retirement age	No	Local 67
New Orleans 556,913	964	68	No	Local 632
Jacksonville, Fla. 541,269	758	65	No	Retirement System
Seattle 481,897	980	No mandatory retirement age	No	Local 27 and Retirement System
Denver 488,765	916	70	No	Retirement System and Local 858
Kansas City, Mo. 446,562	Unknown	65	No	Local 42
Nashville 439,599	850	60	No	Retirement System and Local 763
El Paso 424,522	510	70 (Retirement System) 65 (Local)	No	Retirement System and Local 51
Pittsburgh 423,962	1,085	65	Yes	Retirement System
Atlanta 422,293	No reply		No	
St. Louis 448,640	869	60	No	Retirement System

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